



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 11, 2002

Ms. Kimberly A. Frost  
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Austin, Texas 78746

OR2002-7051

Dear Ms. Frost:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173416.

The Port of Houston Authority (the "authority") received a written request for records pertaining to the authority's acquisition of real property "in and around the Bayport Industrial District dated Jan. 1, 1999 to present." You indicate that some of the responsive information will be released to the requestor. This office has previously ruled on the extent to which some of the records you submitted to this office as responsive to the current records request are subject to required public disclosure. *See* Open Records Letter No. 2002-5733 (2002). Therefore, because it appears that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, the authority may continue to rely on that ruling as a previous determination for purposes of section 552.301 of the Government Code.<sup>1</sup> Accordingly, we need not further address the public nature of those particular documents. *See* Open Records Decision No. 673 (2001). You contend, however, that the remaining submitted documents are excepted from required public disclosure pursuant to sections 552.101, 552.103, 552.104, 552.105, and 552.107 of the

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<sup>1</sup>The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

Government Code. This office has also reviewed comments from the requestor regarding the applicability of the exceptions you raised. *See* Gov't Code § 552.304.

We note at the outset that among the submitted records are executed contracts subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Consequently, the authority must release the executed contracts unless they are made confidential under other law. Sections 552.103 and 552.105 of the Government Code are discretionary exceptions to disclosure that protect the interests of the governmental body and may be waived. As such, these sections are not "other law" that makes information expressly confidential for purposes of section 552.022. Furthermore, although you have raised section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," you have not explained, nor is it apparent to this office, that any of the information contained in the executed contracts is made confidential by law. Consequently, the authority may not withhold the executed contracts under section 552.101, 552.103, or 552.105.

However, you also argue that the executed contracts are excepted from disclosure under section 552.104 of the Government Code. Section 552.104(b) of the Government Code provides

[t]he requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under this section.

We will therefore address your section 552.104 argument for the executed contracts. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of

section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract.

When a governmental body seeks protection as a competitor, however, this office has stated that the governmental body must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

In this case, you argue that the authority faces competition in its efforts to purchase property for the Bayport Project. You state that "not only is the [authority] competing against the sellers who want a better price for their property, but it is also competing against other potential purchasers who also want the property that is the subject of the information the [authority] has withheld." We conclude, however, that you have not demonstrated with any specificity how release of the executed contracts would result in competitive harm to the authority in a particular competitive situation contemplated under section 552.104. Accordingly, the executed contracts must be released to the requestor.

We now address whether the remaining submitted information is excepted from public disclosure. Section 552.105 of the Government Code excepts from required public disclosure information relating to

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

"The opinions construing section [552.105], as well as the actual language of the exception, tie the provision to situations entailing the expenditure of public funds to acquire or use the subject property for public purposes in order to prevent speculation from inflating the price."

Open Records Decision No. 590 at 4 (1991); *see also* Open Records Decision No. 357 (1982). Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted from disclosure pursuant to section 552.105 that pertains to such negotiations may be excepted so long as the transaction relating to those negotiations is not complete. *See* Open Records Decision No. 310 (1982).

Moreover, this office has concluded that information about specific parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* Open Records Decision No. 564 at 2 (1990). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990). After reviewing your arguments and the documents at issue, we conclude that you have met your burden of establishing the applicability of section 552.105 to all of the remaining submitted records. Accordingly, with the exception of the executed contracts discussed above, the authority may withhold the submitted records in their entirety pursuant to section 552.105 of the Government Code.<sup>2</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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<sup>2</sup>Because we resolve your request under section 552.105, we need not address the applicability of the other exceptions you raised.

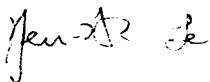
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/RWP/lmt

Ref: ID# 173416

Enc: Submitted documents

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